Supreme Court, U. S.
FILED
JUL 30 1976
MICHAEL RODAK, JR., CLERK

No. 75-1605

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD NIXON, APPELLANT

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

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MOTION OF THE FEDERAL APPELLEES TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees Administrator of General Services and the United States of America move to affirm the judgment of the United States District Court for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-106a) is reported at 408 F. Supp. 321. Opinions of the court of appeals concerning the con-

vening of the three-judge district court (J.S. App. 139a-202a) are reported at 513 F. 2d 427 and 430.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 107a-108a) was entered on January 7, 1976. A notice of appeal (J.S. App. 109a) was filed on March 4, 1976, and the jurisdictional statement was filed on May 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C 1253.

QUESTIONS PRESENTED

Whether the Presidential Recordings and Materials Preservation Act is unconstitutional on its face as a violation of (1) the separation of powers doctrine; (2) presidential privilege doctrines; (3) appellant's right to privacy; (4) the First Amendment; (5) the equal protection component of the Due Process Clause of the Fifth Amendment; or (6) the Bill of Attainder Clause.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article I, Section 9, clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

Article IV, Section 3, clause 2 of the Constitution provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *.

The Fourth Amendment to the Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 *et seq.*, 44 U.S.C. (Supp. IV) 2107 note and 3315-3324, is set out at J.S. App. 110a-123a.

STATEMENT

Appellant resigned as President of the United States effective August 9, 1974. When he left office

a large quantity of documents, files, and other materials, which had been accumulated by him and his staff during his term as President, remained in the government's custody (J.S. App. 7a-9a). These materials include approximately 42 million pages of documents. Appellant estimates that he personally prepared or reviewed 200,000 documents from this collection (J.S. 4). The materials also include more than 800 reels of tape recordings of conversations in the Oval Office, the Cabinet Room, and the Lincoln Sitting Room in the White House, and in appellant's offices in the Executive Office Building and Camp David (J.S. App. 40a). After appellant's resignation, government archivists began to collect these materials for shipment to California, in accord with appellant's instructions (J.S. App. 9a-10a).[1]

Before releasing any materials for disposition according to appellant's pre-resignation instructions, President Ford asked the Attorney General for advice about the ownership of the materials. The Attorney General concluded that, with the possible exception of one type of document, the materials were owned by appellant by virtue of historical practice and the absence of any statute to the contrary (43 Op. Att'y Gen. No. 1 (September 6, 1974); J.S.

[1] The tape recordings referred to by the statute apparently do not include the dictabelt recordings of private recollections that appellant made on occasion. Appellant now has full custody of most of these dictabelt recordings.

App. 124a-133a).[2] The ownership interest was not unqualified, however. The Attorney General informed the President that:

> Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. [J.S. App. 129a.]

The opinion also stated that any ownership interest was qualified by exposure to court orders regarding the materials and based upon their unique nature (J.S. App. 132a-133a).

Following the President's receipt of this opinion the Administrator of General Services executed an agreement with appellant (J.S. App. 134a-138a).[3] Under the terms of the agreement, appellant retained title to all of his presidential historical materials but

[2] The Attorney General expressed no opinion concerning ownership of certain "permanent files." These files consist of materials traditionally retained in the White House from administration to administration, such as "White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action" (J.S. App. 131a, 132a). Appellant claims no rights to these materials in this action (J.S. 12).

[3] The agreement is reported at 10 Weekly Comp. of Pres. Docs. 1104 (1974).

agreed to donate a substantial portion of the materials to the United States at a future date so that they would "be made available, with appropriate restrictions, for research and study" (*id.* at 134a). While appellant reviewed the materials, they were to be deposited with the General Services Administration ("GSA") under the Federal Records Act, 44 U.S.C. 2101 *et seq.*, and transferred to California, where they would be stored in locked areas. Neither appellant nor GSA could gain access to the materials without the consent of the other (*id.* at 135a).

The agreement provided that for three years appellant would not withdraw any original writing, although he could make and withdraw copies of any such materials. Appellant agreed not to withdraw any original tape recording of conversations in the White House or Executive Office Building until September 1, 1979, and to make reproductions of the tapes only with GSA's consent. After the initial three-year period, the agreement provided, appellant could withdraw any of the materials other than the tape recordings (*id.* at 136a). During this time appellant (or government archivists working under his direction) was to review the materials; those he did not withdraw would be donated to the United States, with appropriate restrictions on public access (*id.* at 138a). Following the initial five-year period, appellant would be entitled to designate any tape recording to be destroyed. All of the tape recordings were to be destroyed after ten years (September 1, 1984)

or upon appellant's death, whichever event occurred first (*id.* at 136a).

Implementation of this agreement was delayed at the request of the Watergate Special Prosecutor (J.S. App. 12a). Appellant then brought suit for specific performance of the agreement. The Special Prosecutor and Jack Anderson, a reporter, intervened; the case was consolidated with actions brought by the Reporters Committee for Freedom of the Press and by Lillian Hellman, both seeking to enjoin transfer of the materials and to gain access to them under the Freedom of Information Act, 5 U.S.C. (Supp. IV) 552.

While these consolidated actions were pending, Congress passed and the President signed the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 *et seq.*, 44 U.S.C. (Supp. IV) 2107 note and 3315-3324. Section 101 of the Act directs the Administrator of General Services to obtain and retain possession and control of all of the presidential historical materials and tape recordings from appellant's administration. Appellant's agreement with GSA is abrogated (Section 101(b)). Section 102(b) provides that these materials and recordings shall be made available for use in any judicial proceeding, "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke * * *." Section 102(c) and (d) provides that appellant (or his designate) and the Executive Branch shall have access to the materials, subject to the Administrator's regulations.

Section 103 requires the Administrator to issue regulations to govern custody of and access to the materials. Section 104 requires the Administrator to issue regulations providing "public access" to the materials; these regulations must "take into account" seven factors (Section 104(a)):

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;
>
> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;
>
> (4) the need to protect every individual's right to a fair and impartial trial;
>
> (5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
>
> (6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
>
> (7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

Section 104(b) requires the Administrator to submit the "public access" regulations and any subsequent changes in them to both Houses of Congress and provides that the regulations or changes can be disapproved by a resolution of either House within 90 legislative days of submission.[4] Section 105 provides for "just compensation" to any individual who may have been deprived of private property by the Act.

Title II of the Act establishes a National Study Commission to study and recommend procedures regarding the control, disposition, and preservation of the records of all federal executive, judicial, and legislative officers. The National Study Commission has been appointed but has not yet submitted its report; it is not involved in this litigation.

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[4] The Administrator has submitted to Congress three sets of "public access" regulations. The first set was disapproved by the Senate. S. Res. 244, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. S15803-S15808 (daily ed. September 11, 1975). The Administrator has not sought to enforce these disapproved regulations, and no party to this litigation claims any rights under them. See pages 16-17 and note 10, *infra*. The second set was withdrawn; the Senate disapproved seven provisions of those regulations, believing that the Administrator lacked power to withdraw them. S. Res. 428, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. S5290-S5291 (daily ed. April 8, 1976). The third set was submitted on April 13, 1976, and is pending.

Regulations implementing Sections 102 and 103 of the Act are not required to be submitted to Congress. These regulations were published on January 14, 1975. 40 Fed. Reg. 2669; 41 C.F.R. 105-63. The district court has enjoined the effectiveness of some of these regulations pending disposition of this appeal (J.S. App. 107a-108a).

One day after the Act became effective appellant commenced this action for declaratory and injunctive relief. The complaint sought the convening of a three-judge district court. The district court declined to rule upon the request; it proceeded to file an opinion in the consolidated cases growing out of appellant's agreement with GSA. *Nixon* v. *Sampson*, 389 F. Supp. 107 (D.D.C.). The Court of Appeals for the District of Columbia Circuit stayed entry of judgment in the consolidated cases to enable a three-judge district court to determine whether priority should be accorded to the present action (J.S. App. 139a-202a). A three-judge court was convened and allowed the other parties to the consolidated cases, who were not originally parties to this case, to intervene. The Special Prosecutor intervened and subsequently withdrew (see J.S. App. 16a-18a). Protected by the court of appeals' stay from any *res judicata* or collateral estoppel effects of the single judge's opinion in *Nixon* v. *Sampson*, *supra*, the three-judge district court independently considered appellant's arguments.

The three-judge district court rejected appellant's challenges to the facial constitutionality of the Act (J.S. App. 1a-106a). Noting that the regulations to implement the Act are not yet effective and that any challenge to the implementation of the Act is premature, the court limited its inquiry to the taking of the materials into the government's custody and their screening by government archivists (J.S. App. 3a-4a, 18a-31a). The court carefully considered and rejected each of the arguments appellant makes here.

ARGUMENT

Appellant seeks to raise a number of constitutional issues of central concern to the way power is allocated among the departments of our government and to the ability of the Executive Branch to formulate and carry out policies. For almost two centuries these issues, and others like them, have been left to be accommodated by the ebb and flow of political forces. Appellant challenges one of these accommodations in this case. The issues he seeks to raise, however, are not yet so squarely presented that definitive resolution by this Court is necessary or appropriate.

Under the Act, release of presidential materials to any person outside the Executive Branch cannot occur until after "public access" regulations become effective establishing the rules under which any materials will be released. Appellant's complaints are addressed primarily to the possibility that "public access" regulations may be adopted that will not be sufficiently sensitive to his legitimate interests, and that, even if adequate regulations are adopted, their administration will adversely affect his legitimate interests. But the stark issues of constitutional doctrine that appellant presents are more theoretical than real. His concerns are not yet ready for judicial resolution. Since such regulations had not been promulgated at the time of the district court's consideration of this case, the only issue considered by the court, and available for review here, concerns the facial validity of the Act.

Because this litigation does not involve the regulations or any decisions made under them, appellant is limited to the argument that it is not possible to draft *any* constitutionally permissible set of "public access" regulations under the Act. The district court carefully considered that argument and correctly rejected it. There is no need for plenary review. Further judicial consideration of the underlying issues appellant seeks to raise should appropriately await issuance of final regulations.

1. a. The district court correctly rejected appellant's argument that the Act is an unconstitutional encroachment by Congress on powers reserved to the Executive Branch (J.S. App. 31a-35a). Far from invading the autonomy of the Executive Branch, the Act places the materials in the custody of the Administrator, an executive official responsible to the President, and provides that Executive Branch employees have access to the materials "for lawful Government use, subject to the [Administrator's] regulations" (Section 102(d)). See 41 C.F.R. 105-63.205, 105-63.206 and 105-63.302.

The Act also provides that the materials are to be made available for use in judicial proceedings, but such availability is expressly subject to any rights, defenses, or privileges which any person may invoke. Although the Act contemplates public access to some of the materials of historical value, it also recognizes the need "to protect any party's opportunity to assert any legally or constitutionally based right or privilege" (Section 104(a)(5)) and to return other materials to appellant (Section 104(a)(7)). The Act thus ensures that there will be no disclosure of the materials to persons outside the Executive Branch in violation of any defenses or privileges asserted by appellant or the Executive Branch.[5] Cf. *United States* v. *Nixon*, 418 U.S. 683. Accordingly, the Act on its face does not violate the principle of separation of powers.[6]

b. Notwithstanding the Act's express protection of any rights and defenses of appellant and the Executive Branch, appellant argues that Congress lacks any power regarding the control, review, and disclosure of presidential materials (J.S. 16-17).

An Act of Congress does not invade the "autonomy" of the Executive Branch simply because it requires the Executive Branch to act in specified ways.

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[5] Section 105-63.401-2 of the Administrator's proposed public access regulations (submitted April 13, 1976) provides that the Senior Archival Panel of Executive Branch employees processing the materials shall, in limited circumstances, submit specific materials to a Presidential Materials Review Board for a determination whether the materials relate to abuses of Government power or otherwise have general historical significance. Cf. 122 Conf. Rec. S5291 (daily ed. April 8, 1976). Two of the four members of this Board (the Librarian of Congress and a nominee of the Council of the Society of American Archivists) are not Executive Branch officials. If this provision becomes effective, however, Section 105 expressly authorizes a judicial action to determine whether this minimal possible screening of materials by personnel outside the Executive Branch will offend the Constitution. There is no need for this Court to render an advisory opinion on that issue.

[6] But see note 10, *infra*.

The Constitution, which commands the President to "take Care that the Laws be faithfully executed" (Article II, Section 3), makes the President a servant of laws passed within the scope of a grant of power to Congress. Congress has frequently enacted measures providing for disclosure of documents in the possession of the Executive Branch. The Freedom of Information Act, 5 U.S.C. (Supp. IV) 552, the Privacy Act of 1974, 5 U.S.C. (Supp. IV) 552a, the Federal Records Act, 44 U.S.C. 2101 *et seq.*, and the statutes regarding census data, 13 U.S.C. 8-9, and tax returns, 26 U.S.C. 6103, are a few of many such acts. Legislation of this sort has never been considered a facially invalid "invasion of the autonomy of the Executive Branch" (J.S. 16). Cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73; *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255.[7]

Like the documents governed by these statutes, presidential materials are an appropriate subject for legislation. Since *Folsom* v. *Marsh*, 9 Fed. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841) (Story, J.), it has been recognized that regardless of where legal title lies, the government's interest in disclosure or non-

[7] Appellant's analogy of presidential materials to judicial drafts (J.S. 17) is not convincing. Each case reaching this Court is a separate event, and only the opinion of the Court is a precedent. But the conduct of the Nation's affairs by the Executive Branch is a continuous process, in which unpublished documents may hold the key to understanding and success. Procedures suitable for the records of Justices may be quite intolerable if applied to Presidents.

disclosure of presidential materials can take precedence over the desires of the authors.

Legislation regarding the materials from appellant's term as President is supported by the strong need for access by government officials to the materials as well as for general historical purposes. For example, in carrying out their duties, current officials have found it necessary to review portions of the materials concerning SALT negotiations with the Soviet Union, our relations with the People's Republic of China, the Vietnamese negotiations concluded in 1973, and negotiations regarding the Middle East situation (affidavit of Jeanne W. Davis, dated July 25, 1975). Some important documents, such as memoranda of conversations between appellant and foreign leaders, can be found only in the materials at issue here (affidavit of Jeanne W. Davis, *supra;* deposition of Jeanne W. Davis, taken July 30, 1975, pp. 64-69).

These presidential materials, which by and large were produced by public employees at public expense, were affected at their creation by a public interest (*Folsom* v. *Marsh*, *supra*) that gives the Nation important rights to them, even against the claims of appellant. The Act operates to enforce those rights pursuant to Congress' power under the Property Clause (Article IV, Section 3) to "make all needful Rules and Regulations respecting * * * Property belonging to the United States."[8] Moreover, as

[8] "[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress" (*Kleppe* v. *New*

a regulation of property affected by the public interest, the Act is constitutional without regard to whether appellant has a valid claim of ownership to the materials. To the extent that some of the materials may be determined to be the personal property of appellant, Congress has exercised its power of eminent domain and provided for whatever compensation may be constitutionally necessary.[9] Use of the eminent domain power to acquire and preserve the historical record is proper. *Berman* v. *Parker*, 348 U.S. 26, 32; *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668. Once the materials have been so acquired, the Property Clause confers ample authority for their disposition under the Act.

We would have greater pause if the Act hindered the Executive Branch in carrying out its functions under Article II of the Constitution. The Executive Branch has a right to "autonomy" in the sense that Congress cannot so hamstring its operations that its ability to function is frustrated.[10] Thus the Act

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Mexico, No. 74-1488, decided June 17, 1976, slip op. 6), and this Court has repeatedly given the Property Clause an "expansive reading" (*id.* at 9-10). See also J.S. App. 63a-66a n. 49.

[9] In light of the public interest that inhered in the materials at their creation, we do not concede that the Act would be a "taking" even if appellant could establish private ownership. The Act preserves appellant's access to the materials. Although it may diminish their monetary value to appellant, that is not always enough to constitute a "taking." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590.

[10] For that reason we believe that the provision for a one-house veto in Section 104(b) of the Act, is an unconstitu-

would be open to question if it so threw open the process of decision-making in the Executive Branch that it became difficult for the President to obtain candid advice from the other Executive Branch officials, or for those officials to speak frankly to each other. Cf. *United States* v. *Nixon*, *supra*, 418 U.S. at 705-706, 715; *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148-155. The Act does not create this sort of hazard, however; because it recognizes the importance of privacy and preserves existing privileges, and because the Executive Branch, acting through the Administrator, is entrusted with control of the day-to-day administration of the materials, we submit that the Act does not create such dangers of widespread breach of confidence that it is unconstitutional on its face.

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tional attempt by Congress to participate in the detailed administration of the Act. See also Article I, Section 7, clause 3. The position of the Executive Branch concerning one-house vetoes in general is explained in the testimony of Assistant Attorney General Scalia in Hearings on H.R. 3658 and H.R. 8231 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 1st Sess. 373 (1975). See also Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983 (1975); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (1953). Cf. *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip op. 113-117, 131-136 and n. 176.

But the provision for a one-house veto is not in issue here; the district court did not pass upon it. Although appellant challenged the Act on that ground in the district court (see J.S. App. 25a-26a n. 17) he does not press that challenge here, nor does he claim any right under the disapproved regulations.

2. The district court properly rejected appellant's claim (J.S. 20-25) that the Act violates the qualified privilege for presidential communications, which, as this Court recognized in *United States* v. *Nixon*, *supra*, 418 U.S. at 715, is founded upon "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article."

That privilege is based upon the harm that could be done to the decision-making process by public disclosure of the materials. As such, it does not pertain to all presidential materials (although an incumbent President may have other privileges with respect to other presidential materials), and it does not pertain to disclosure to incumbent officials of the Executive Branch. See *Folsom* v. *Marsh*, *supra*. The business of government requires that the President and executive officials have access to the papers of his predecessors, and we submit that no claim of privilege can hinder this access.[11]

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[11] The district court expressed doubt (J.S. App. 39a-40a) whether a former President may assert a presidential privilege in litigation against private parties. We do not share this doubt; we believe that a former President's materials concerning the communications, submissions and deliberations essential to the conduct of his office are presumptively privileged. The privilege attaches to the documents themselves. It is for the benefit of the republic, the President, and his advisers alike, and it does not dissipate upon a change of Presidents or even the death of an ex-President. The confidentiality necessary to ensure uninhibited discussion must be measured in decades. It cannot be limited to the term of office of a particular President. Such a privilege should be recognized by a court if asserted by a former President, and a court should recognize a privilege of this sort even if no individual asserts it.

Only appellant, officials of the Executive Branch in the conduct of their official duties, and archivists who, pursuant to regulations not yet effective, will screen and classify the materials, have access to the materials. No "public access" is imminent. Access by the archivists is not meaningfully different from screening by a court *in camera*; it poses no realistic danger of breach of confidence or inhibition of discussions among executive officials. See *United States* v. *Nixon*, *supra*, 418 U.S. at 706, 714-716; *Kerr* v. *United States District Court*, No. 74-1023, decided June 14, 1976, slip op. 10-11. That being so, the Act does not on its face infringe the presidential privilege that appellant is entitled to assert.

Difficult questions still may arise concerning particular screening techniques and eventual public access, but consideration of them is premature until the regulations have become effective. The opinion of the district court manifests great solicitude for appellant's rights. It observes that in some cases access even by executive officials to certain types of documents may be forbidden (J.S. App. 26a-27a n. 18) and that concern for appellant's rights must be "paramount" (*id.* at 22a); it suggests ways in which screening of the materials can be accomplished with a minimum of intrusion (*id.* at 29a-31a). There is no support for appellant's apparent belief that his legitimate interests will be overlooked when he seeks

judicial review of the regulations ultimately promulgated.

In any event, only a small portion of the 42 million pages of documents and more than 800 reels of tape in issue could be subject to a legitimate claim of privilege by appellant. The privilege would not attach to materials unrelated to the performance of executive duties.[12] *United States* v. *Nixon, supra,* 418 U.S. at 703-714. Appellant estimates that he personally prepared or reviewed only 200,000 of the documents. Even some of those materials are not privileged; the privilege applies only to communications originating in confidence and not yet disclosed to the public. Some of the materials have become matters of public record through appellant's voluntary disclosures and are no longer privileged. Most of the material therefore falls outside the scope of any recognizable privilege.

Finally, appellant cannot claim that the materials were created with the expectation that they would be kept privileged or private in perpetuity. Every President since Hoover has deposited most of his presidential materials in a library pursuant to the Presidential Libraries Act, 44 U.S.C. 2107 and 2108 (see J.S. App. 43a). Only a few presidential materials have been withheld. Each President or his

[12] Some materials unrelated to appellant's presidential duties may be subject to another privilege, such as attorney-client or husband-wife. But few of the documents would be subject to such privileges, and it is impossible to determine which these will be until the archivists have examined them.

representative has allowed professional archivists to screen the materials and to suggest appropriate restrictions upon access; appellant had planned to follow a similar course. The sheer bulk of the materials would make any other course infeasible (J.S. App. 72a, 83a n. 59). With or without the Act, then, eyes other than appellant's would screen most of the materials.

3. The district court correctly rejected (J.S. App. 67a-89a) appellant's claim that the Act unconstitutionally invades his personal privacy (J.S. 22-25). Appellant was, for the term of his Presidency, the quintessential "public figure." Cf. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265; *Kelley* v. *Johnson*, No. 74-1269, decided April 5, 1976. His voluntary decision to seek the Presidency relinquished any "privacy" interest in the way he conducted that office and administered the public trust. *Uniformed Sanitation Men* v. *Sanitation Commissioner*, 392 U.S. 280, 284.

A former President may have a "privacy" interest in some of his documents, but that interest would pertain to only a few of the materials in issue here.[13]

[13] The district court believed that appellant's "privacy" interest in the materials is established and protected by the Fourth Amendment. That is not necessarily so. The materials were left in the government's possession when appellant resigned and have not been "seized" within the meaning of the Fourth Amendment. *Couch* v. *United States*, 409 U.S. 322, 335-336; *Burdeau* v. *McDowell*, 256 U.S. 465. The review of the documents may be a "search," but in light of the governmental interest in the documents and the fact that they were generated by governmental personnel, the ordinary standards of "reasonableness" would not pertain. There

Most of the papers were prepared or seen by others; many were circulated widely within the government. Cf. *United States* v. *Miller*, No. 74-1179, decided April 21, 1976. Appellant himself prepared or reviewed relatively few of the documents. Portions of some of them have been disclosed or discussed in public and therefore are no longer private. *United States* v. *Dionisio*, 410 U.S. 1, 14; *Katz* v. *United States*, 389 U.S. 347, 351. Appellant expected to donate most of his materials to a presidential library, where they would be read by others. Appellant's principal purpose in making the tape recordings was to preserve the conversations for historical purposes (Deposition of Richard M. Nixon, taken July 25, 1975, pp. 72-73), a purpose that could be fulfilled only by allowing individuals other than appellant to have access to them.

Whatever "privacy" interest appellant may have in the remaining materials is outweighed by the strong public interest in their preservation. We have already discussed the need of officials of the Executive Branch to have access to the materials in order to conduct the affairs of state. The Act also ensures that materials of historical significance will be pre-

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should be no need to establish "reasonableness" (let alone to obtain a warrant) before personnel of the Executive Branch may examine documents created by the Executive Branch itself. Although the source of the "privacy" interest in the materials therefore is elusive, we assume *arguendo* in the following discussion that some constitutionally generated or protected privacy interest exists. But cf. *Paul* v. *Davis*, No. 74-891, decided March 23, 1976, slip op. 19-20.

served and professionally processed in order to make available an accurate historical record (J.S. App. 49a-52a), and it ensures that materials will be preserved for use in judicial proceedings (Section 102 (b)). Congress reasonably perceived that these and other legitimate public interests would be jeopardized if appellant had the sole right to screen the materials and to separate the "private" from the "public." [14]

Even when all of this is taken into account some irreducible residuum of privacy may be invaded. Congress took pains to establish a mechanism to mitigate the problems caused by this invasion. The Act acknowledges the need to give appellant "sole custody and use" of all materials not related to the abuses of power known as "Watergate" and not of general historical significance (Section 104(a)(7)). The

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[14] For example, during the time appellant had custody of the tape recordings an unexplained 18½ minute erasure was made in one tape sought by the Special Prosecutor. 9 Weekly Comp. of Pres. Docs. 1370, 1372 (1973); H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 127 (1974). During the hearings on the proposed articles of impeachment appellant issued transcripts of what he represented were the taped conversations. 10 Weekly Comp. of Pres. Docs. 450-458 (1974). After the House Judiciary Committee obtained the recordings it concluded that appellant's transcripts have "proven to be untrustworthy" and contained "significant omissions, misattributions of statements, additions, paraphrases, and other signs of editorial intervention * * *" (H.R. Rep. No. 93-1305, *supra*, at 205, 129). Congress perceived these and other discrepancies as raising questions about appellant's reliability as a custodian. That doubt further supports Congress' decision to entrust the task of screening to disinterested archivists.

initial screening will be conducted by disinterested archivists; screening of this sort, like submission of materials to a court *in camera*, does not create a significant invasion of privacy. *Department of the Air Force* v. *Rose*, No. 74-489, decided April 21, 1976. To the extent screening by the archivists is itself an invasion of privacy, the intrusion is attributable in part to appellant's practice of commingling public and private documents (see J.S. App. 63a). He could have established a separate file for truly personal matters, but did not; he should not now be entitled to claim that the statute is unconstitutional on its face because the archivists, "whose record for discretion in handling confidential material is unblemished" (*id.* at 45a), will be required to sift through private documents. Finally, as is the case with appellant's other arguments, more particularized claims can be made once the regulations have become effective. "Objections [appellant] now presses might be mooted by regulations that protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass * * *" (J.S. App. 21a).

4. For many of these reasons, the court below also properly rejected (J.S. App. 89a-93a) appellant's First Amendment claim (J.S. 25-27). "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley* v. *Valeo*, *supra*, slip op. 58. This Court has recognized, however, that "particularly when the 'free functioning of our national institutions' is involved," the need for disclosure may outweigh the First Amendment interests. *Id.* at 60-61, quoting from *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 97. As we have discussed, the Act will allow public access only to those materials related to "Watergate" or having general historical significance. The initial screening of all the materials by disinterested archivists does not infringe appellant's First Amendment rights. The private knowledge of the archivists will not deter appellant from expressing himself in the future concerning public issues; it will not prevent other individuals from associating with appellant (J.S. App. 92a-93a).

5. Appellant contends that the Act violates the equal protection component of the Due Process Clause of the Fifth Amendment because Title I applies only to the materials from his Presidency (J.S. 28). There is nothing to this claim. Appellant is the only President to resign; this alone distinguishes him. And as the district court observed (J.S. App. 93a-94a), the presidential materials of all other recent past Presidents already are available in presidential libraries, the incumbent President needs his papers to carry out his duties, and the papers of future Presidents pose no immediate problem with which Congress must grapple. The classification established by Congress is rational and responds to the nature of the problem presented. Cf. *City of New Orleans* v. *Dukes*, No. 74-775, decided June 25, 1976; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

6. The Act is not a bill of attainder or of pains and penalties. It is hard to imagine how an Act of Congress expressly providing for "just compensation" for any property interest taken can be thought to be an imposition of "penalties." However that may be, there is no evidence that Congress acted with a punitive intent.

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation * * *.

Flemming v. *Nestor*, 363 U.S. 603, 614, quoting from *De Veau* v. *Braisted*, 363 U.S. 144, 160 (plurality opinion). The district court found ample evidence that Congress acted to protect the public interest by ensuring the preservation and processing of the materials (J.S. App. 100a-101a). Moreover, as the court below also noted, the Act's specific protections of appellant's right to purely personal materials negates the claim that the Act is a bill of pains and penalties (J.S. App. 102a). See *United States* v. *Brown*, 381 U.S. 437, 441-446.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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JULY 1976.

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